JD–27–22
Channahon, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SPIKE ENTERPRISE, INC.

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO

Cases 14–CA–281652
13–CA–282513
13–RC–281169

Kevin M. McCormick, Esq.,
for the General Counsel.
Gregory H. Andrews, Sarah J. Gasperini,
and *Elliot R. Slowiczek*, *Esqs.*,
(Jackson Lewis P.C.), for the Respondent.
Melinda S. Burleson* and *Emil P. Totonchi, Esqs.,
for the Charging Party.

DECISION

Statement of the Case

IRA SANDRON, Administrative Law Judge. Procedurally, the case arises from (1) a first amended complaint issued on December 16, 2021 (the complaint),[1] based on charges that the Charging Party (the Union or Local 150) first filed against the Respondent (the Company or Spike) on August 19 in Region 14, and the later charges it filed in Region 13; and (2) a December 20 order consolidating challenges and the Union's objections to the mail-ballot election conducted in November.

The issues before me have arisen from the petition that the Union filed on August 11 to represent Spike's employees at its three Illinois locations, including ExxonMobil, Channahon (ExxonMobil), the situs of all alleged unfair labor practices;[2] and the unfair labor practice strike that the Union called on August 20.

Pursuant to notice, I conducted a Zoom trial from January 31–February 3 and February 15–18, 2022, during which I afforded the parties a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

[1] All dates hereinafter occurred in 2021 unless otherwise indicated.
[2] The other two locations are Citgo Petroleum, Lemont (Citgo); and Valero Terminal, Blue Island (Blue Island).

Alleged Unfair Labor Practices at ExxonMobil[3]

(1) Did the Respondent on August 12 discharge Robert Rossey (Rossey) in violation of Section 8(a)(3) and (1) of the Act? (UO 18)

(2) Did the Respondent on August 18 discharge Cody Franzen (Franzen) in violation of Section 8(a)(3) and (1)? (UO 25)

(3) Did Project Manager David Allen (Allen) commit the following violations of Section 8(a)(1):

a. On August 16, in a group meeting,

(1) Threatened employees with a reduction in wages if they chose the Union as their bargaining representative? (UO 20)
(2) Threatened employees with discharge if they went out on an economic strike? (UO 22)

b. On about August 16, told Nikolas Holland (Holland) to remove a Local 150 sticker from his truck, thereby creating an impression that the Respondent was surveilling employees' union activities? (UO 21)

c. On August 17, in an individual meeting with Steve Selby (Selby),

(1) Threatened a reduction in wages if employees chose the Union as their bargaining representative?
(2) Told Selby that he knew who signed authorization cards, thereby creating an impression that the Respondent was surveilling employees' union activities? (UO 21)
(3) Threatened employees would be discharged if they went out on an economic strike? (UO 22)
(4) Announced a stricter enforcement of rules because of the union organizing drive? (UO 23)
(5) Stated that he would never sign a contract with the Union, thereby saying that it would be futile for employees to select the Union as their bargaining representative? (UO 24)

(4) Did Labor Consultant Ahmed Santana (Santana) commit the following violations of Section 8(a)(1):

a. In about late August, told employees in a group meeting that the Company was working on a petition that would make a union election unnecessary? (UO 26)

[3] I will indicate where a Union objection (UO) parallels the unfair labor practice allegation.

b. At that same meeting, gave employees the impression that they were required to sign a petition denouncing their support for the Union?

Challenges and Objections

The tally of ballots issued on November 23 was five votes for the Union, eight against, and eight challenged ballots, out of about 23 eligible voters. (GC Exh. 9.)

Challenges

The Union challenged the ballots of the following individuals as alleged supervisors, all of whom Acting Regional Director Paul Hitterman (the Regional Director) found to be eligible employees in his 27-page Decision and Direction of Election (DDE) of October 8 (GC Exh. 10):

(1) Petr Jesiolowski (Jesiolowski) – ExxonMobil
(2) Quinn Johnson (Johnson) – ExxonMobil
(3) Jeff Lundberg (Lundberg) – Citgo
(4) Robert Weathersby (Weathersby) – Blue Island
(5) Chris Woodward (Woodward) – Blue Island

The underlying representation case hearing was held on September 9, 10, and 13, resulting in a 699-page transcript.[4]

The Union was afforded a full opportunity to present evidence in the representation case in support of its position that the above individuals were supervisors. However, after reviewing the evidence and analyzing the applicable law, the Regional Director rejected the Union's assertions in a comprehensive and well-reasoned decision.

It is long settled that a party in an unfair labor practice proceeding may not relitigate issues which were or could have been raised in a related representation case in the absence of newly discovered or previously unavailable evidence. *Krieger-Ragsdale Co.*, 159 NLRB 490, 494 (1966), enfd. 379 F.2d 517 (7th Cir. 1967), cert. denied 389 U.S. 1041 (1968), citing *Pittsburgh Plate Glass Co.*, 313 U.S. 146, 162 (1941) ("[I]t was up to [the company or the union] to indicate in some way the evidence they wished to offer was more than cumulative. Nothing more appearing, a single trial of the issue was enough."). See also *D & M Co.*, 181 NLRB 173, 174 (1970). In other words, a party is not entitled to the proverbial two bites at the apple.

At the hearing, the Respondent objected to relitigating the supervisory status of the named individuals, and the General Counsel adhered to the Regional Director's findings. In agreement with the Respondent, I limited the Union to questioning witnesses only on new evidence that was unavailable at the representation case hearing and therefore not addressed in the DDE.

At trial, the Union agreed with the Region's finding that Lundberg is a unit employee (Tr.

[4] The parties stipulated to the admission of the underlying representation case hearing transcript as Jt. Exh. 1.

560.) However, the Respondent on the last day of hearing introduced a Citgo gate log of October 18 (R. Exh. 158), in which Lundberg has the title "site supervisor." The Union's brief (at 52) points this out. Nevertheless, as the Respondent's counsel stated at trial, title alone is insufficient to establish supervisory authority. See *Veolia Transportation Services, Inc.*, 363 NLRB 902, 912 (2016); *Heritage Hall, E.P.I Corp.*, 333 NLRB 458, 458–459 (2001). Moreover, the General Counsel continues to consider Lundberg an employee (see, e.g., GC Br. at 10 fn. 3). Accordingly, I see no reason to overturn the Region's determination of his employee status.

Finally, although several employees testified that they viewed Jesiolowski and Quinn as supervisors., subjective perceptions of employees are considered secondary indicia of supervisory authority that cannot support a finding of supervisory status in the absence of any of the statutory indicia. See *Sam's Club,* 349 NLRB 1007, 1014 (2007); *J. C. Corp.*, 314 NLRB 157, 159 (1994).

I therefore overrule the Union's challenges to the ballots of the above individuals and will order that they be opened and counted.

In the DDE (at 23), the Regional Director rejected the Union's position that Jordan Darnell was a temporary employee ineligible to vote. During the tally of ballots on November 23, the Union challenged his ballot. However, this was not included as one of the Union's objections, and the Union presented no evidence at trial regarding his status. I will therefore order that his ballot be opened and counted.

The Company challenged the ballots of Rossey and Franzen as terminated employees. If they are found to have been wrongfully discharged, the challenges to their ballots will be overruled. See *David Saxe Productions, LLC*, 370 NLRB No. 103. slip op. at 6 (2021); *F.L Smithe Machine Co.*, 305 NLRB 1082, 1082 (1992), enfd. 995 F.2d 218 (3d Cir. 1993).

Union's Objections

I indicated above the objections that are also alleged by the General Counsel to have constituted unfair labor practices. The following objections are not complaint allegations:

15. Holland placed his mail ballot in the U.S. Mail, but it was not received or counted by the NLRB at the vote count on November 23 (the deadline for receipt was November 22).

16. Employee Cody O'Neal (O'Neal) placed his mail ballot in the U.S. Mail on approximately November 9 or 10, in Crest Hill, Illinois, but it was not received or counted by the NLRB at the vote count on November 23.

28. On or about October 9, Owner Jeff Hill (Hill) informed employees working at Spike's Citgo facility that he had convinced the NLRB that individuals who the Union had asserted were supervisors were eligible to vote, including Lundberg, Jesiolowski, Johnson, Weathersby, and Woodward, creating the impression of management involvement in the election.

The following objections relate to conduct by persons who have been found to be employees and not Section 2(11) supervisors as alleged by the Union:

17. On August 12, Jesiolowski interrogated employees about Local 150 stickers on lockers, and asked if they were "sucking the same dick."

19. Beginning around August 12, Jesiolowski and Johnson began trading taking lunch in the breakroom and smoke shack so they could overhear employees' conversation, when previously Jesiolowski normally napped in the breakroom and Johnson took his lunch in his truck, creating an impression of surveillance.

27. On September 3, Lundberg forwarded a petition for "decertification" to counsel for Local 150 and the NLRB, signed by five individuals who are 2(11) supervisors, and for which signatures were solicited by Supervisor Jesiolowski, creating the impression of management involvement and surveillance in the election.

Because Jesiolowski, Lundberg, and Quinn were employees and not Section 2(11) supervisors, their conduct was not imputable to the Respondent. Accordingly, these objections are overruled without the need to discuss testimony thereon.

Witnesses and Credibility

The General Counsel called:

(1) Rossey and Franzen.
(2) Ray Sundine (Sundine) – Local 150 director of organizing.
(3) Striking employees Holland, O'Neal, Selby, and David Schell (Schell).
(4) Nonstriking employees Lundberg and Raymond DeZee (DeZee).

The Respondent's witnesses were:

(1) Hill – Spike's owner, president, and CEO.
(2) Lee-Ann Hill (Ms. Hill) – Spike's vice president.
(3) Allen.
(4) Project Manager Eric Wollenzien (Wollenzien), Citgo.
(5) Shelby Bitner (Bitner) – administrative assistant, ExxonMobil.
(6) Nonstriking employees Jesiolowski, Roy Garner (Garner), Wesley Martz (Martz) Jeffrey Mathis (Mathis), Daniel Matis (Matis), and Shayne Schwartz (Schwartz).

I will address credibility by section, applying the following well-established judicial precepts. Firstly, a witness may be found partially credible because the mere fact that the witness is discredited on one point does not automatically mean he or she must be entirely discredited. *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 799 (1970). Rather, a witness' testimony is appropriately weighed with the evidence as a whole and evaluated for plausibility. Id. at 798–799; see also *MEMC Electronic Materials, Inc.*, 342 NLRB 1172, 1183

fn. 13 (2004); *Excel Containers, Inc.*, 325 NLRB 17, 17 fn. 1 (1997).

Secondly, when credibility resolution is not based on observations of witnesses' testimonial demeanor, the choice between conflicting testimonies rests on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Taylor Motors, Inc.*, 366 NLRB No. 69, slip op. at 1 fn. 3 (2018); *Lignotock Corp.*, 298 NLRB 209, 209 fn. 1 (1990).

DeZee was the only employee witness of the General Counsel who is still working for the Respondent, other than Lundberg, who by all accounts circulated a decertification petition. DeZee was credible, making no apparent efforts to exaggerate or slant his testimony against the Company. The Respondent's counsel asked him no questions, either after he testified in the General Counsel's case in chief or as a rebuttal witness.

In assessing DeZee's credibility, I also take into account that '"the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interest.'" *PPG Aerospace Industries,* 355 NLRB 103, 104 (2010), quoting *Flexsteel Industries,* 316 NLRB 745, 745 (1995), enfd. mem. 83 F.3d 419 (5th Cir. 1996).

The General Counsel (GC Br. at 10 fn. 3) contends that this precept should also apply to his witnesses out on strike, as well as to Lundberg. However, I find it appropriate to limit its scope to DeZee. Striking employees have a financial stake in the proceeding and stand to gain if the General Counsel prevails, and Lundberg, as the initiator of a decertification petition, presumably has interests antithetical to those of the Union and favorable to the Company.

Facts

Based on the entire record, including testimony and my observations of witness demeanor, documents, stipulations, and the thoughtful posttrial briefs that all parties filed, I find the following.

Board jurisdiction as alleged in the complaint is admitted, and I so find. At all material times, the Respondent has been a corporation with an office and place of business in Oklahoma City, Oklahoma, engaged in the business of tank cleaning at the three Illinois locations named earlier.

Allen is Spike's project manager at ExxonMobil, and Wollenzien is the Company's project manager at Citgo. They report to owner, president, and CEO Hill. Ms. Hill, his spouse, is the vice president. She does all the office management and billing. At ExxonMobil, Spike has two connected trailers: an office trailer where Allen and Shelby have offices, and a breakroom trailer where employees have their lockers and keep their personal protective equipment (PPE), and take lunch.

Union Organizing

It is undisputed, and I find, that Holland first contacted Sundine of Local 150 in around the late summer or fall of 2020 and started handing out and collecting authorization cards in June. See GC Exh. 2, which contains 14 signatures. Meetings with employees were held starting in approximately April, at a restaurant or a bar in Channahon. The frequency of meetings and the number of employees in attendance increased in time, with seven to nine employees attending shortly before the petition was filed on August 11. Not always the same employees attended. In June or July, Sundine also gave employees group tours of the Union's training facility so that they could learn of the training benefits that the Union offered.

On August 11, the Union filed a petition in Case 13–RC–281169, seeking to represent a unit of all full-time and regular part-time operators, techs, and laborers employed at the Respondent's three Illinois locations.

General Counsel's Exhibit 6 reflects the following. At 3:27 p.m. that day, the Union emailed Allen a copy of the petition and accidentally included as an attachment copies of the 14 authorization cards. At 8:04 p.m. on August 12, Allen responded that he was unable to accept or reply to any legal documents. At 10:52 a.m. on August 13, the Union emailed a copy of the petition and authorization cards to the Hills, who in turn forwarded them to counsel.

As to the above, I do not believe the statement in counsel's response to the Union (GC Exh. 6 at 1) that Allen did not review the email to him until nearly 24 hours later. I find it wholly implausible that Allen would not have immediately opened it, or at the very least done so within a very short time of its receipt, and then immediately forwarded the petition and authorization cards to the Hills.

Furthermore, the claim in counsel's response that no one at Spike saw the authorization cards until the Hills received their email strikes me as a self-serving and transparent attempt to get around the timing issue regarding Rossey's discharge on August 12. In this regard, Ms. Hill sent an email dated August 11 (date-stamped August 12) to managers concerning the employees' organizing effort and how management should respond (GC Exh. 14). Although Ms. Hill was called as a witness, she was not asked about that email or for an explanation for the inconsistency in dates. In all of these circumstances, I find it only reasonable to conclude that Allen on August 11 had actual notice of the petition and of the names of employees who signed authorization cards, that he immediately forward them to the Hills, and that they then took an active role in responding.

The Union called a strike on August 20 to protest the discharges of Rossey and Franzen. Seven employees went out on strike that day. The strike continues to date.

At trial, the General Counsel called Lundberg only with regard to the General Counsel's pending 10(j) proceeding. (GC Br. at 12.) The General Counsel takes the position that Lundberg was credible in his testimony that he alone created and circulated a decertification petition (GC Exh. 4), which 13 employees signed between August 30 and September 2. In this regard, other witnesses corroborated him regarding his distribution of the petition. The Union (U

Br. at 11–12, 39) expresses doubts that he did not receive management assistance, but his testimony was not so farfetched as to be unbelievable, and suspicion alone does not suffice as a basis for discrediting him. I find that he was credible and that management did not assist him.

I described earlier the subsequent developments in the representation case in connection with objections to the election.

The 8(a)(1) Allegations

Allen's conversation with Holland on about August 16

The Respondent does not dispute the testimony of Holland and Rossey that on August 12, for the first time, they wore shirts with a union emblem to work.

Holland provided a detailed and credible account of the August 16 incident, whereas Allen did not offer any testimony thereon. When a party does not question a witness about damaging or potentially damaging testimony, it is appropriate to draw an adverse inference and find that the witness would not have disputed such testimony. See *LSF Transportation, Inc.*, 330 NLRB 1054, 1063 fn. 11 (2000); *Asarco, Inc.*, 316 NLR 636, 640 fn. 15 (1995), modified on other grounds 86 F.3d 1401 (5th Cir. 1996). I therefore credit Holland and find as follows.

On the morning of approximately August 16, Holland was sitting in the breakroom trailer when Allen approached and asked him to follow him outside. When they were in the walkway between the breakroom and office trailers, Holland asked him why. Allen replied that Holland had put a union sticker on his company truck and had to take it off. Holland replied that he had not, but Allen repeated what he had said, and Holland agreed to remove it but said that he did not know where it was. He followed Allen out to truck. They walked around it but could find no sticker. Allen told Holland to stay there for a minute and he would be right back. Allen went to the office trailer. He returned a couple of minutes later and apologized to Holland for having been wrong.

Allen's August 16 group meeting

Allen made a PowerPoint presentation (GC Exh. 7) to all employees at ExxonMobil in the officer trailer shortly after the lunch hour (11 a.m. to 12 noon). He first asked employees to put their cell phones in Bitner's office because he was going to share confidential information. He went through the slides. During the meeting, O'Neal asked about his job review, and Schell questioned Allen's statements about the Company losing money in its contractual relationship with ExxonMobil. The meeting lasted about 45 minutes. Neither the General Counsel nor the Union contend that anything contained in the slides themselves violates the Act.

Allen's testimony about the genesis of the PowerPoint presentation was wholly incredible. He averred that he sua sponte alone put together the very sophisticated PowerPoint presentation from his own online research and then presented it to employees on August 16 and 17—even though the owners had told him not to. Moreover, his testimony was directly contradicted on cross-examination by the email that Ms. Hill sent to managers on either August

11 or 12, showing that the owners and legal counsel approved of the presentation and were going to review it in advance. (GC Exh. 14.) He equivocated on when he first spoke to Ms. Hill about the PowerPoint and unsuccessfully tried to explain away the August 11 date at the top of her email by testifying that she might have had her dates wrong. One would scarcely expect such an error from the Company's vice president, who is in charge of its office management and billing. Irrespective of whether the date was August 11 or 12, the email contradicts Allen's testimony.

No one would reasonably expect employees who attended the meeting to recall verbatim everything that Allen said. Franzen, Holland, and Schell were the General Counsel's witnesses who testified about the meeting. Their accounts were detailed but not identical, leading me to conclude that they were based on genuine recall and not fabricated or scripted. In this regard, Franzen and Schell both testified that Allen stated that there would be a pay cut if employees went union because of Spike's relationship with ExxonMobil, but Holland initially answered no when I asked him if Allen said anything about benefits.

The Respondent's witnesses who testified about the meeting were Bitner, Garner, Jesiolowski, Martz, Mathis, and Schwartz. Bitner overheard only some of what Allen said because she was in her office performing her work. All of these witnesses offered only cursory accounts of Allen's statements, despite the numerous subjects that he covered in a presentation that took place only 6 months before the hearing. This leads me to believe that they may have been reticent to fully detail everything they recalled. In any event, I find that the General Counsel's witnesses' more expansive accounts were more reliable, and I credit them.

Despite Allen's testimony that he strictly followed the contents of the PowerPoint, I find that he did make statements that went beyond the language on the slides. Thus, one of the slides (GC Exh. 8 at 5) states, "We are allowed to replace any employee that goes on strike for economic reasons" but makes no mention of unfair labor practice strikes. On cross-examination, Allen testified that he deviated in no way from the PowerPoint and said nothing else about strikes. However, he was impeached by his affidavit, in which he stated, "I said we could replace the employees if they went on strike for economic reasons, but we could not replace them if they went on strike for ULP reasons." (Tr. 1251.) Bitner also corroborated Holland's testimony that Allen discussed the two types of strikes, and I credit Holland that Allen stated that if employees walked out because Rossey was fired and it was not found to be an unfair labor practice, he did not have to take them back. I further note Matis' testimony that "[f]or the most part," Allen said what was on the screen (Tr. 809), signifying that he made statements beyond what was on the slides.

Turning to the threat of reduction of wages, Franzen's, Holland's, and Schell's accounts were not identical but were the same in substance. In connection with Allen's slide presentation describing the ramifications of unionization vis-à-vis Spike's contractual relationship with ExxonMobil, I credit Franzen and Schell and find that Allen went beyond the wording of the slides and stated that employees would receive a pay cut if they went union because of that financial relationship. (Tr. 194, 288.) In this regard, although Holland testified that Allen said nothing about benefits, he did indirectly corroborate Franzen and Schell by testifying that Allen stated that Spike was already losing money in order to pay employees more and would go bankrupt if the employees went union. (Tr. 66.)

Allen's August 17 meeting with Selby

Selby was off from work on August 16, and the following morning, Allen made the same PowerPoint presentation solely to Selby, again in the office trailer.

Selby, who was employed by Spike since March 2015, gave a very detailed account of what Allen said during the course of his presentation, including statements concerning Rossey's discharge, and I do not believe that he fabricated them. The little cross-examination that was conducted on his testimony on the subject did not detract from his credibility. Selby appeared candid, and I have found other aspects of Allen's testimony to be farfetched. For these reasons, I credit Selby over Allen where their testimony diverged and find as follows.

Allen first asked Selby to place his cell phone in the room next door. Allen kept saying that he had to make the presentation because the employees, including Selby, had signed cards. At one point, Allen stated that he knew who signed cards and that employees had come up to him asking to revoke them. He talked about the pros and cons of a union and contracts and stated that if the employees went union, they could no longer have one-on-one conversations with him, and he would have to go by the book and strictly follow the rules. Allen further stated that ExxonMobil would never agree to a union. He also said that if employees went on strike for unfair labor practices, he could not get rid of them, but if they went on strike for anything else, they would be terminated.

During their conversation, Allen brought up Rossey. He asked Selby if Selby had seen what happened (on August 12), to which Selby replied no. Allen then stated that Rossey had a few safety violations and "kind of an attitude . . . and was trying to show off his Local 150 shirt and stickers on his hard hat." (Tr. 643–644.) He went on to say, "I didn't fire Rossey because of his safety violation. I fired him because he was a prick . . . [b]ecause of his attitude . . . cocky . . . trying to show his support towards the union." (Tr. 644.) When I asked Selby if he responded to what Allen was saying about Rossey, he testified that he simply said, "[W]ow, okay," because he did not want to engage in a conversation about it. (Tr. 645.)

Santana's group meetings

In about late August, Labor Consultant Santana held a couple of weekly meetings with ExxonMobil employees in the office trailer. Santana was not called as a witness. At the first meeting, he introduced himself as an ex-union organizer and made a PowerPoint presentation that discussed the NLRA. (R. Exh. 110.) At a second meeting, he went through the Union's constitution. (R. Exh. 111.) At each meeting, he asked if there were any questions. The meetings lasted from 40 minutes to an hour. Neither the General Counsel nor the Union aver that anything in his slides violated the Act.

Of the persons who attended Santana's ExxonMobil meetings, only Matis and Schell gave testimony on whether Santana raised the subject of a petition.

Matis gave a very abbreviated account of what Santana said at the meetings and could

recall only that Santana distinguished between facts and his opinions and at one meeting discussed the Union's constitution. He testified that Santana did not say anything about a decertification petition.

On the other hand, Schell testified in more detail, as follows. He attended a meeting with Santana on about September 2 or 3. Santana introduced himself as an attorney and said that he used to work with or for a union. He gave a slideshow presentation that included the salaries of union officials. At this or a subsequent meeting, Santana had newspaper clipping regarding someone who crossed a picket line, was not allowed to work, and was sued by the union. At the end of this meeting, he commented, "[W]e're working on a petition where this might not even be a problem," and he smiled. (Tr. 304.) Hill came in at that time and also smiled.

The General Counsel contends (GC Br. 32) that an adverse inference should be drawn from the Respondent's failure to call Santana to testify in rebuttal to Schell. However, Matis testified that Santana did not mention a petition, and I will give the Respondent the benefit of the doubt and infer that the Respondent decided it was unnecessary to call Santana to testify. See *Michigan Bell Telephone Co.*, 371 NRB No. 63, slip op. at 1 (2022).

Even so, Hill was a witness but was not asked about the incident. As I stated earlier, when a party does not question a witness about damaging or potentially damaging testimony, it is appropriate to draw an adverse inference and find that the witness would not have disputed such testimony. See *LSF Transportation, Inc.*, supra; *Asarco, Inc.*, supra.

In light of the above, I credit Schell's more detailed account rather than that of Matis.

Rossey's Discharge

Rossey's employment

Rossey was employed as a vacuum truck operator for Spike since January 2017. He also performed labor work. At ExxonMobil, Allen was always his supervisor.

On February 17, 2020, Rossey received a written warning for "multiple" safety violations that Allen and the ExxonMobil "safety buddy" (safety manager) had observed. (R. Exh. 36.) As a result, Allen verbally coached him and reassigned him to another job for the remainder of the day.

In September 2020, Holland first approached Rossey about the Union, and Rossey thereafter talked to several employees, both at work and off-site, about the benefits that the Union offered. He and Holland met with Sundine about every 6 weeks. After about April, the three met about 10 times with other employees, either at a restaurant or a bar. About five to seven employees attended these meetings.

Until April, Rossey worked at ExxonMobil. That month, Allen wrote him up in an incident report (R. Exh. 23), stating that Rossey "intentionally disregarded protocol by failing to assure all openings were closed. . . .," thereby causing a massive hazardous waste spill of over

200 gallons. As a result, Allen removed him from the site and asked Wollenzien if he could use Rossey at Citgo. Allen testified that he did not terminate Rossey at the time because "he showed that he was genuinely upset with himself for making the mistake. . . . So I didn't feel that he was beyond improvement. . . ." (Tr. 1136.)

In an unpersuasive attempt to minimize the gravity of that incident and the consequences to Rossey vis-à-vis what occurred on August 12, Allen tried on cross-examination to characterize the incident report as nondisciplinary—even though the form states, "disciplinary warning" and was placed in Rossey's personnel file.

After that, Rossey worked 2-l/2 months each at Citgo and Blue Island. During that time, according to Allen, Rossey called him at least half a dozen times, asking to be permitted to return to ExxonMobil. Allen finally allowed him to return on August 9 because Allen felt that enough time had passed and that Rossey was "on the right path and . . . could be a valuable member." (Tr. 1136–1137.)

On July 28, Wollenzien issued Rossey a written warning for falling asleep in his truck. (GC Exh. 15.) He was sent home for the day. The progressive disciplinary program (R. Exh. 2) provides that falling asleep on the job is a Group A offense, the most serious, generally calling for immediate discharge. However, Wollenzien testified that Rossey was not terminated because he was outside a process area, not even on Citgo property, and posed no immediate danger.

Events of August 12

Terminology

Before describing what occurred that day, an overview of certain terms may be helpful.

An H2S meter or monitor is worn around an employee's breathing area, such as on a shirt collar, to measure the presence of hydrogen sulfide gas, which can be dangerous. When a certain level is reached, the meter flashes, buzzes, and beeps loudly. This is called a "meter hit."

The policy to follow when that occurs is uncontroverted. Employees get out of the area, either upwind or crosswind, and report it to a supervisor, who in turn reports it to EPNR or the fire and safety arm of ExxonMobil. EPNR is not always called and does not necessarily come to the site. EPNR was not called on August 12.

Inside the process area, the policy is that employees are required to wear personal protective equipment (PPE) at all times. See R. Exh. 39. This includes hard hat, hearing protection, steel-toed boots, flame- or fire-resistant clothing (FRC), and an H2S meter.

A wheel chock is a block of rubber that prevents a truck from rolling forward or backward.

Events

That morning, Rossey, for the first time, wore his black 150-shirt when he came to work. The same day, he put union stickers on his hard hat and locker.

Allen's testimony as to Rossey's behavior on August 12 was unbelievable and causes me to doubt his account of what occurred that day. As described above, Allen testified that in the April incident, Rossey demonstrated contrition and remorse, and he thereafter repeatedly pleaded with Allen to allow him to come back to ExxonMobil.

Yet, according to Allen, there was what can only be described as a 180-degree swing in Rossey's attitude between April and August, from contrition to contempt. Thus, Allen testified that when he raised safety violations to Rossey on August 12, only 3 days after Rossey was permitted to return to the site, Rossey demonstrated indifference and utterly bizarre behavior, twice shrugging and staring at Allen with his hands on his hips. Furthermore, Allen testified that when he discussed the violations with Rossey in the trailer later that day, Rossey raised his shoulders and shrugged as though nothing Allen stated mattered. I can see nothing in the record that would explain Allen's depiction of Rossey's drastic change in attitude.

Rossey answered questions readily and without hesitation, and his recall of events was detailed. He appeared candid, as reflected in his volunteering on direct examination that he was asked to leave the ExxonMobil site in April by one of its safety coordinators.

For the above reasons, I credit Rossey's testimony where it diverged from Allen's. I also credit Selby that he was in the area, despite Allen's testimony that Selby "was nowhere near there." (Tr. 1156.) I note that Selby, who witnessed some but not all of what occurred between Rossey and Allen, did not contradict Rossey to the extent of his observations. I therefore find as follows.

On August 12, Rossey worked at the waste-water treatment plant on the northside of the refinery. He drove a vac truck and hauled hazardous material with Selby on the passenger side. Selby assisted him in loading and unloading. As Rossey was offloading the vac truck, his H2S meter had a meter hit. He attempted to inform Allen, who was working around a centrifuge or processing equipment, by walking up to him about 3 to 5 feet away and trying to get his attention. He called Allen's name and stayed for about 2 minutes. However, Allen was focused on running the centrifuge, which was not operating properly. Allen did not acknowledge him. Rossey then returned to his truck to go to the breakroom, to notify another supervisor (Jesiolowski), whom he knew would be there.[5] Selby was with him.

When Rossey went back into the truck, he took off his FRC, H2S meter, and hard hat because it was hot. When he drove off, he ran over a wheel chock in between the tires. He stopped, got out, and picked it up. His FRC was still off, but he had put his hard hat back on.

[5] Jesiolowski testified that if an employee has a meter hit and cannot reach Allen, the employee notifies him, and he then reports it to Allen.

After Rossey was back inside the truck, Allen signaled for him to stop. Allen approached the driver's door and told him to put his PPE back on, exit the vehicle, and meet him at the rear of the vehicle. Rossey put on his FRC shirt and H2S meter and met him there.

Allen saw that Rossey's meter was alerted and asked why he did not report it. Rossey replied that he had attempted to tell Allen, but Allen had not acknowledged his presence. Allen told him to go to the trailer and wait for him.

When Rossey arrived at the breakroom trailer, he notified Jesiolowski of the meter hit. Jesiolowski asked if he had told Allen, to which Rossey replied that he had. It was about 11 a.m., the start of lunchtime, and all other employees were there.

Allen arrived about an hour later, after lunch was over. He and Rossey went to his office. There, Allen stated that he had to give Rossey a written warning regarding his infractions and asked why Rossey had not reported the hit immediately. Rossey responded that he had not been able to get Allen to acknowledge his presence. Allen presented him with the writeup. (GC Exh. 3.) He stated that Rossey had to leave the plant for the day and that he would contact him regarding whether he could come back to work the next day. Rossey was still wearing his Local 150 shirt at the time.

The three infractions listed on the writeup were (1) failure to report H2S meter hit, (2) running over the wheel chock, and (3) not wearing his FR shirt or H2S meter.

Rossey left the site at about 12:40 p.m. He texted Allen at about 4 p.m. and asked if he could come back the next day. Allen replied that he would let him know shortly.

Allen testified that he checked with an attorney for the Company, who advised him to treat Rossey like any other employee and that he and Hill decided to terminate Rossey.

At about 6:10 p.m. Allen called Rossey and said that he was terminated for the safety infractions he had committed that day. Rossey responded that he was shocked because no one else had been fired for those reasons. Allen then stated that Rossey was a safety liability but might be able to come back in a couple of years.

On cross-examination, Allen was evasive on the question of other terminations for safety violations. He could not say how many employees have been terminated during his tenure as plant manager since 2006. He testified that three to five employees have been terminated for "safety violations" but could not say whether they were terminated solely for such violations. He named two employees who were both terminated over 5 years ago but provided no details, and the Respondent provided no documentation concerning any prior discharges.

Other H2S meter hits

Rossey testified without contradiction that he, Allen, and Selby had meter hits right before lunch on August 10, at the same job location. Allen instructed them to evacuate the area and not return until the meters went down to zero. Rossey did not see EPNR come out that day.

I credit Selby's testimony that he has had about 15 meter hits during his employment but did not always immediately report it to a supervisor. The last occurred probably in 2020, when he and a coworker both had meter hits while doing cleanouts at a pit for waste-water treatment. He did not report it to Allen and Jesiolowski until the end of the day, when he returned to the office about 3-1/2 hours later. They told him to report it to them immediately next time, but he received no discipline. I note that other witnesses, including Martz, Matis, and Schell testified that they have had or have observed other employees getting meter hits.

There is no evidence that any employee other than Rossey has been discharged for having a meter hit and/or not reporting it quickly enough.

Wearing of PPE

Witnesses for the General Counsel and for the Respondent gave conflicting testimony on whether, in practice, the policy is strictly adhered to at all times.

Allen, who has been employed by Spike since 2006, testified that he has never seen an employee driving in a truck and not wearing FRC in a process area. The Respondent's employee witnesses, Garner, who has been employed 8 years; Schwartz, who has been employed for over 5 years; Martz, who has been employed 3-1/2 years; and Mathis all testified that they have never seen anyone not wearing FRC in the process areas or in a truck. Jesiolowski, who has been employed for 8 years, testified that he has never seen anyone in process areas not wearing FRC. Martz testified that he has never taken off his FRC in process areas or in a truck and never heard of anyone other than Rossey not wearing FRC. I find their testimonies that they never saw this occur highly implausible and do not credit them. I believe that as currently working employees, they may have been reluctant to admit that they or others have on occasion violated the policy.

I find more believable the consistent testimonies of Holland, Rossey, Schell, and Selby that there is not always strict adherence to the policy. All of them testified that on hot summer days, employees have removed their FRC when inside their trucks coming from or going to a job. Rossey also testified that he has removed his FRC long-sleeve shirt when getting into a vehicle.

Schell made no effort to underplay management's view of the importance of wearing FRC, bolstering my conclusion that he was candid and reliable. He testified that it is important that employees' outer layer of clothing be up to code, anywhere on site. When he took off FRC, as stated above, he admittedly was verbally admonished, explaining that a supervisor would tell him to put in on, and he did so immediately because it was viewed "pretty seriously. . . ." (Tr. 318.) At another point, Schell testified that Jesiolowski would "ream out" him and other employees for not wearing all PPE. (Tr. 345.)[6]

[6] Schell received a written warning on April 19 (R. Exh. 152) for not having regular safety equipment. It mentions protective gear. Allen sent him home for the remainder of the day.

Holland, too, confirmed that the policy is to wear FRC all the time. However, he further testified that special PPE ("chem suits") are required when working inside tanks, that they get very dirty, and that employee have removed them when walking 10 to 20 feet back to their trucks. His testimony also suggests that supervisors did express disapproval ("[W]e would never really get yelled at for it." (Tr. 94)).

Although Rossey stated that Allen observed him without his FR long-sleeve shirt and said nothing, he did volunteer that he received verbal warnings from Allen or Jesiolowski for not wearing other PPE at different times. I credit Rossey's testimony that he has seen other employees not wearing the H2S meter over 12 times. He has also observed both Allen and Jesiolowski not wearing them; the last occasion was after his return on August 9. Rossey had also seen Allen and Jesiolowski not wearing FRC. For example, he observed Jesiolowski not wearing any FRC inside the plant in the process block in 2020 at tank 507 and also saw Allen on numerous occasions get out of his truck without wearing a FR shirt and then put it on.

There is no evidence that any employee other than Rossey has been discharged for not wearing PPE (including FRC or the H2S meter).

Running over a wheel chock

I credit Selby's testimony that he ran over a wheel chock at least 5–10 times but was never disciplined. On occasion Allen or Jesiolowski observed it and told him not to forget the chocks and not to let it happen again. He has seen other employees run over them and never heard of anyone terminated for that reason.

There is no evidence that any employee other than Rossey has been discharged for running over a chock.

Franzen's Discharge

Franzen's employment

Allen interviewed Franzen on about June 28. The resume that Franzen gave to him (CP Exh. 1) had as Franzen's objective "[t]o get started on the right path to become an operating engineer." He testified without contradiction that Allen told him that the Respondent was a nonunion company and did not plan to be unionized.

Franzen was employed from July 15 at ExxonMobil as a tech two, opening drain pads, cleaning up drum barrels, and collecting garbage. Franzen later signed an authorization card, and he attended one union meeting, on August 17.

ExxonMobil requirements for new Spike employees

New employees must attend training at 3 Rivers before they are allowed access to the ExxonMobil facility. Franzen completed such training on July 21. See R. Exh. 102. ExxonMobil also requires a new employee to take a New to Site Test (NTST) after they are

onsite, after 30 days, to show their understanding of rules and safety measures. They must pass with 100 percent and can retake the test once if they fail the first time.

Franzen's NTST

Franzen was a more credible witness than Allen, and I credit his account of what occurred, as follows.

At lunch on August 17, Allen informed Franzen that he would be taking the NTST immediately after lunch. Franzen was not provided any preparation. Allen told him that he needed 100 percent or would be kicked off the site for 6 months.

Allen administered the test to him. (R. Exh. 103.) During the test, Franzen stated that he had a question, but Allen responded that he could not help him out. Allen was not there the entire time but took the test from Franzen when he was finished. Franzen asked if he could take it a second time if he did not pass, and Allen replied yes.

The next day, Allen told him that he had gotten three answers wrong (R. Exh. 103 shows four wrong). Franzen asked if Allen could show him which ones they were. Allen replied that he should not, but he did. Allen stated that he could take the test a second time and had to pass. Allen administered the second test (R. Exh. 88) and was again with Franzen part of the time. Afterward, Allen put question marks by some answers and gave him an opportunity to explain. Franzen still missed two questions (R. Exh. 88 shows three).

Allen testified that he did not know what would happen to Franzen because he never had anybody fail the test before, and he had to check ExxonMobil policy. See R. Exh. 21. He learned that Franzen, having failed the test twice, could not come on the site for 6 months. In the evening, Allen called Franzen and told him this. Franzen asked why he was being treated differently from other people who were tested and helped by Jesiolowski. Allen replied that he had no control over how other people tested with Jesiolowski.

Allen called Citgo Supervisor Wollenzien later that day and asked if he could use an extra hand. Wollenzien replied no, that his work was slow.

General Counsel's Exhibit 11 reflects that as of August 2, the Respondent was taking applications for two positions. In late August, DeZee and Hayden Wollenzien were offered positions. (GC Exhs. 12, 13.) Wollenzien testified that there are days when there is not enough work at Citgo, and employees are sent to ExxonMobil or Blue Island.

Other employees and the NTST

As Jesiolowski testified, he is the one who administers the NTST, and DeZee, Holland, Martz, Mathis, Matis, O'Neal, Rossey, and Schell all testified that he was the one who tested

them.[7] There is no evidence that Allen has ever administered the test to anyone other than Franzen.

Jesiolowski candidly testified that he runs employees through a checklist (R. Exh. 19) before giving them the test and reads them the questions in advance. Furthermore, "[A]t the end they usually have a couple [of] questions about a couple [of] questions on the test, and I just help them out with it." (Tr. 997.) He does this by giving them hints, running through different scenarios to get them closer to the correct answers without flat out giving them. He has administered about five tests a year but never had anyone fail.

Consistent with that testimony, several employees testified that Jesiolowski helped them pass the test by giving them from one or two to eight correct answers. These included DeZee, Holland, O'Neal, and Schell. Moreover, O'Neal overheard Jesiolowski tell an employee an answer, and the safety coordinator who administered the test to Selby helped Selby correct answers that he initially got wrong.

The Respondent points out (R. Br. at 29) that Holland's testimony that he did not know a single answer and that Jesiolowski fed them to him was hard to believe. However, Holland's testimony on cross-examination was more plausible. He explained that on some questions, he put down partial answers, and Jesiolowski helped him to finish them. See R. Exh. 151, Holland's NTST. This was consistent with Jesiolowski's testimony.

OBJECTIONS

Here, I will address the Union's objections that are not the subjects of unfair labor practice charges.

> 15. Holland placed his mail ballot in the U.S. Mail, but it was not received or counted by the NLRB at the November 23 vote count.

Holland testified that he received a mail ballot on November 15 and placed it in the post office drop box at the Braidwood Post Office on November 16. I have no reason to doubt his testimony. As the initiator of the Union's organizing effort and an avid union supporter, I have to assume that he had a very strong interest in getting his vote counted. I will therefore order that his ballot be opened and counted.

> 16. O'Neal placed his mail ballot in the U.S. Mail on approximately November 9 or 10, in Crest Hill, Illinois, but it was not received or counted by the NLRB at the November 23 vote count.

O'Neal testified that he received a ballot at beginning of November and placed it in his mailbox on November 9, flipping up the little red flag as was his normal practice for showing the letter carrier that he had outgoing mail. It was later gone from the mailbox, presumably having been picked up by a letter carrier. I have no reason to doubt O'Neal's testimony and will order

[7] Selby, who was hired in March 2015, was given the test by a safety coordinator.

that his ballot be opened and counted.

> 28. On or about October 9, Hill informed employees working at Citgo that he had convinced the NLRB that individuals who the Union had asserted were supervisors were eligible to vote, including Lundberg, Jesiolowski, Johnson, Weathersby, and Woodward, creating the impression of management involvement in the election.

Hill held several meetings at Spike's three Illinois locations in about the third week of October. DeZee attended one of them, at Citgo.

Hill testified that he read verbatim the notice of election (R. Exh. 154) and a prepared speech (R. Exh. 153). Wollenzien corroborated this, although DeZee recalled that Hill did not read from anything. This difference in testimony does not affect an analysis of the objection, to which DeZee was the only witness to testify.

DeZee testified that Hill stated in an upbeat manner that he had gotten some people the right to vote and talked as though that was a win. Lundberg was behind him. As Hill spoke, he gave Lundberg a tap on the back.

I conclude that this conduct did not reasonably create an impression that the NLRB had made decisions based on any unlawful interference by Hill. I therefore overrule this objection.

Analysis and Conclusions

The 8(a)(1) Allegations

A. Did Allen, on August 16, in a group meeting, (1) threaten employees with a reduction in wages if they chose the Union as their bargaining representative, and (2) threaten employees with discharge if they went on strike?

(1) Allen stated that due to Spike's contractual relationship with ExxonMobil, employees would receive a loss of pay if they went union. Axiomatically, this was an unlawful threat of loss of benefits

(2) Allen stated that economic strikers would lose their jobs and did not provide a full explanation of their rights to reinstatement under *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1969). This was in the context of other statements that suggested employees could lose their jobs if the Union was voted in, because of Spike's relationship with ExxonMobil. I therefore find that Allen's statement was unlawful. See *Great Dane Trailers,* 293 NLRB 384, 384 (1989); see also *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967).

The Respondent (R. Br. 48) cites *Washington Post Co. v. District Unemployment Compensation Bd.*, 379 A.694, 697 (D.C. Court of Appeals 1977) for the proposition that "[a]n employer, when faced with an economic strike, may permanently replace economic strikers." However, the next sentence in the court's decisions reads, "[H]owever, a permanently replaced

striker continues to be an employee with the meaning of the National Labor Relations Act, and cannot be denied reinstatement absent substantial business justifications" [fn. omitted], citing *Laidlaw Corp.* and *Fleetwood Trailer Co.* above.

By the above conduct, the Respondent, through Allen, violated Section 8(a)(1) of the Act.

B. Did Allen, on August 17, in a meeting with Selby, (1) threaten employees with discharge if they went on strike; (2) announce stricter enforcement of rules because of the Union's organizing drive; (3) say that he would never sign a contract with the Union, thereby stating that it would be futile for employees to select the Union as their bargaining representative; and (4) tell Selby that he knew who signed authorization cards, thereby creating an impression that the Respondent was surveilling employees' union activities?

(1) Allen stated that if employees went on strikes for unfair labor practices, he could not get rid of them, but if they went on strike for anything else, they would be terminated. For the reasons stated above, this violated Section 8(a)(1).

(2) Allen stated that if employees went union, they could no longer have one-on-one conversations with him and that he would "have to go by the book" and strictly follow the rules.

By so threatening stricter enforcement of work rules, Allen violated Section 8(a)(1). See *Remington Lodging & Hospitality, LLC*, 363 NLRB 987, 987 fn. 1 (2016), enfd. 847 F.3d 180 (5th Cir. 2017); *DHL Express, Inc.* 355 NLRB 1399, 1400 (2001).

(3) Allen stated that ExxonMobil would never agree to a union.

By making a statement tantamount to saying that selecting union representation would be futile, Allen violated Section 8(a)(1). See *North Star Steel Co.*, 347 NLRB 1364, 1365 (2006); *Triple H Fire Protection, Inc.*, 326 NRB 463, 464 (1998).

(4) Allen stated that he knew who had signed cards and kept saying that he had to make the presentation because the employees, including Selby, had signed cards.

The Board's test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement in question that his/her union activities had been placed under surveillance. *Moutaineer Steel, Inc.*, 326 NLRB 787, 787 (1998), enfd. Fed.Appx. 180 (4th Cir. 2001), citing *United Charter Service*, 306 NLRB 150 (1992). By saying that he knew who had signed cards—including Selby—without providing any explanation of how he knew, Allen gave Selby reasonable belief that employees' union activities had been surveilled. He thereby violated Section 8(a)(1).

C. Did Allen, on about August 16, tell Holland to remove a Local 150 sticker from his truck, thereby creating an impression that the Respondent was surveilling employees' union activities?

That morning, Allen told Holland that he had put a union sticker on his company truck and had to take it off. Holland replied that he had not, but Allen repeated what he had said, and Holland agreed to remove it but said that he did not know where it was. They went out to the parking lot and examined the truck but found no sticker. Allen apologized to Holland for having been wrong.

Inasmuch as the truck was in a public area and clearly visible, Allen's statements did not imply any kind of surveillance, and I find no merit to that allegation. Indeed, there was no such sticker.

However, I do find that Allen's conduct amounted to unlawful harassment of Holland, the employee who initiated the organizing effort and distributed and collected authorization cards. See *Miklin Enterprises, Inc.*, 361 NLRB 283, 290 (2014). The fact that no sticker was found strongly suggests that Allen had an improper motive rather than a good-faith belief. Accordingly, Allen's conduct violated Section 8(a)(1) on that basis.

D. Did Santana in about late August, tell employees in a group meeting that the Company was working on a petition that would make a union election unnecessary, and at that same meeting, give employees the impression that they were required to sign a petition denouncing their support for the Union?

At the meeting, Santana made the statement that "we're working on a petition where this might not even be a problem," and both he and Hill smiled. The only "petition" that was in play at the time was Lundberg's decertification petition. This suggestion of management involvement in the petition violated Section 8(a)(1), even though there is no evidence that such involvement actually occurred.

The allegation that Santana gave employees the impression that they were required to sign a petition denouncing their support for the Union is not supported in the record, and I dismiss it.

The 8(a)(3) Analytical Framework

In cases in which the issue is the motive behind an employer's action against an employee (was it legitimate or based on animus on account of the employee's union or protected concerted activities?), the appropriate analysis is provided by *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); see also *Auto Nations, Inc.*, 360 NLRB 1298, 1301 (2014), enfd. 801 F.3d 767 (7th Cir. 2015).

Under *Wright Line,* the General Counsel bears the initial burden of establishing that an employee's union or other protected concerted activity was a motivating factor in the employer's adverse employment action. *Wright Line*, above at 1089. The Board has held that the General Counsel can meet this burden by establishing (1) union or other protected activity by the employee, (2) employer knowledge of that activity, and (3) antiunion animus, or animus against protected activity, on the employer's part. See, e.g., *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). In *Tschiggfrie Properties, Ltd.*, 368 NLRB No.

120, slip op. at 5–8 (2019), the Board clarified the animus element of this test, explaining that the General Counsel "does not *invariably* sustain his burden of proof under *Wright Line* whenever, in addition to protected activity and knowledge thereof, the record contains *any* evidence of the employer's animus or hostility toward union or other protected activity." Id., slip op. at 7 (emphasis in original). "Instead, the evidence must be sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee." Id., slip op. at 8.

Once the General Counsel makes out a prima facie case, the burden shifts to the respondent to show that the same action would have taken place even in the absence of the protected activity. *Wright Line*, above at 1089; *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996). To establish this affirmative defense, an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *East End Bus Lines, Inc.*, 366 NLRB No. 180, slip op. at 1 (2018); *Consolidated Bus Transit*, 350 NLRB 1064, 1066 (2007). Where the General Counsel has made a strong showing of discriminatory motivation, the employer's defense burden is substantial. *East End Bus Lines*, Ibid; *Bally's Park Place, Inc.*, 355 NLRB 1319, 1321 (2010), enfd. 646 F.3d 929 (D.C. Cir. 2011).

The Respondent's brief emphasizes that Spike took no disciplinary actions against Holland, the lead union organizer by all accounts. This does not, however, insulate the Respondent from being found to have unlawfully discriminated against Rossey and Franzen. An employer's failure to take action against all or some other union supporters does not disprove discriminatory motive, otherwise established, for its adverse action against all or some other union supporters. See, e.g., *Handicabs, Inc.* 318 NLRB 890, 897–898 (1995), enfd. 95 F.3d 681 (8th Cir. 1996); *Master Security Services*, 270 NLRB 543, 552 (1984).

Rossey's Discharge on August 12

Step one of the analysis is determining whether the General Counsel has established a prima facie case. As to employer knowledge, Rossey wore a union shirt in Allen's presence on August 12 and on the same day put union stickers on his locker. He also signed an authorization card, which Allen knew on August 11. Express animus is demonstrated by the statements that Allen made to Selby, that Rossey had a "kind of an attitude. . . and was trying to show off his Local 150 shirt and stickers on his hard hat. . . .," and "I didn't fire Rossey because of his safety violation. I fired him because he was a prick . . . because of his attitude . . . cocky . . . trying to show his support towards the union."[8]

Animus can also be inferred from the following. None of the employees who testified—either those for the General Counsel or those for the Respondent—knew of any employee other than Rossey who has ever been terminated for having H2S meter hits, not reporting them quickly, or not wearing FRC. For not wearing FRC, employees have been verbally admonished but not subjected to more severe discipline. There is no evidence that any employee other than

[8] I find it unnecessary to address whether Allen's statements about the reasons for Rossey's discharge, not alleged in the complaint, were also independent violations of Sec. 8(a)(1) because they are encompassed by the issue of the legality of the discharge itself.

Rossey has been disciplined for running over a wheel chock. Allen could give no details about two employees whom he allegedly discharged, at least in part for safety violations, over 5 years ago; and the Respondent produced no supporting documentation. Accordingly, on this record, Rossey is the only employee who has ever been discharged for safety violations alone.

The Respondent's disparate treatment of Rossey strongly suggests that unlawful animus motivated the decision to discharge him. See, e.g., *Mondelez Global, LLC*, 369 NLRB No. 46, slip op. at 4 (2020); *La Gloria Oil & Gas Co.* 337 NLRB 1120, 1124 (2002), affd. 71 Fed.Appx. 441 (5th Cir. 2003); *Southwire v. NLRB*, 820 F.2d 453, 460 (D.C. Cir. 1987) (absence of evidence employer discharged any other employee for similar violation).

The timing of Rossey's discharge—just 1 day after the petition was filed and the same day that Rossey first openly expressed his support for the Union—also raises a strong inference of unlawful animus. See *Healthy Minds, Inc.*, 371 NLRB No. 6, slip op. at 7 (2021); *Mondelez Global, LLC*, above, slip op. at 1; *Velox Express, Inc.*, 368 NLRB No. 61, slip op. at 10–11 (2019).

Accordingly, I conclude that the General Counsel has made out a prima facie case.

The second step is determining whether the Respondent has rebutted this prima facie case by showing that it would have discharged Rossey regardless of his union activity. The Respondent contends that Rossey was discharged because he engaged in several safety infractions on August 12: (1) failure to report H2S meter hit, (2) running over the wheel chock, and (3) not wearing his FR shirt or H2S meter.

As stated above, the Respondent's failure to show that it has ever discharged any other employees for these offenses undermines any claim that it has treated them as grounds for termination in the past.

Moreover, in earlier incidents in 2021, Allen was much more lenient in disciplining Rossey for equivalent or even more serious safety violations. Firstly, in February, Rossey received a written warning for "multiple" safety violations. Allen did not terminate Rossey but instead verbally coached him and reassigned him to another job for the remainder of the day. Secondly, in April, Allen wrote him up for "intentionally disregard[ing] protocol" and causing a massive hazardous waste spill of over 200 gallons. This had to result in great financial cost and potential health risks. Nonetheless, Allen again did not terminate Rossey but instead removed him from the site and asked Wollenzien if he could use Rossey at Citgo.

Even according to Allen, prior to August 12, he had no intention of discharging Rossey; he allowed Rossey to return to ExxonMobil on August 9 because enough time had passed and Rossey was "on the right path . . . to becoming a valuable member."

As I stated earlier, Allen unsuccessfully attempted to justify why he discharged Rossey for safety violations in August but had not done so in April. His averment that Rossey was contrite and remorseful in April but demonstrated contempt for Allen in August was wholly

unbelievable, particularly in light of Allen's testimony that Rossey had repeatedly pleaded with him to be able to return to the site.

The Respondent has therefore not satisfactorily established that it would have discharged Rossey on August 12 had he not engaged in union activity that day, the day after the petition was filed. Accordingly, the Respondent has failed to rebut the General Counsel's prima facie case.

I conclude that what Allen expressed to Selby was the real reason Rossey was fired—his overt support for the Union. Accordingly, Rossey's discharge violated Section 8(a)(3) and (1).

Franzen's Discharge on August 18

As to step one of the *Wright Line* analysis, the resume that Franzen presented to Allen at his interview had as an objective to "get started on the path to become an operating engineer," and Franzen signed an authorization card, of which Allen had knowledge on August 11.

There is no evidence of specific animus against Franzen for engaging in union activity. However, animus can be inferred from the following: (1) there is no evidence that Allen has ever administered the NTST to anyone other than Franzen; (2) in recent years, Jesiolowski has administered all NTSTs and helped employees to pass; and (3) there is no evidence that any employee other than Franzen has ever failed the NTST. In this regard, Allen testified that he did not know the consequences of an employee failing the test because it had never happened before. Disparate treatment can lead to the inference of unlawful motivation. See the cases cited above.

Similarly, the timing of the discharge, a week after the petition was failed, also can be considered as reflecting inferred animus. See the cases cited above. I therefore find that the General Counsel has established a prima facie case.

Turning to the second step of *Wright-Line*, the factors cited above also lead to the conclusion that Franzen was not discharged for legitimate reasons. It is highly significant that in the 16 or so years that Allen has been the Spike project manager at ExxonMobil, no one other than Franzen has been excluded from the site for failing to pass the NTST. Thus, Jesiolowski testified that he administers about five NTSTs yearly and has never had anyone fail. He substantially corroborated the testimony of several employees that he assisted them both before and during the test to arrive at the right answers. Clearly, Allen did not provide Franzen with the same level of assistance that other employees have received on a regular basis. In sum, the record demonstrates that Spike has a longstanding and consistent practice of ensuring that all of its employees pass the NTST so that they can remain employed on the site, failing in Franzen's case alone to adhere to that practice.

The Respondent points out (R. Br. 21) that Allen called Citgo Supervisor Wollenzien later that day and asked if he could use an extra hand. However, that would have been unnecessary had Franzen received the assistance that other employees have been given to pass the NTST.

Based on the above, I conclude that the Respondent has failed to rebut the General Counsel's prima facie case and that Franzen's discharge violated Section 8(a)(3) and (1).

Gissel Bargaining Order

Both the General Counsel and the Union urge a bargaining-order remedy under *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613 (1969), wherein the Court found that a bargaining order is appropriate where an employer's unfair labor practices have so decreased the chance of a fair election that the already expressed desires of employees for representation (here, the employees' authorization cards) are a more reliable indication of free choice than an election would be. Id. at 603 ("[C]ards, though admittedly inferior to the election process, can adequately reflect employee sentiment when that process has been impeded."). As the Respondent points out (R. Br. 50), a bargaining order is an extraordinary remedy, with the preferred route being to provide traditional remedies for an employer's unfair labor practices and to hold an election "wherever such remedies may be sufficient to cleanse the atmosphere of the effects of the unlawful conduct." *Desert Aggregates*, 340 NLRB 289, 289 (2003), citing *St. Agnes Medical Center*, 304 NLRB 146, 147–148 (1991).

In *Gissel*, the Supreme Court identified two categories of employer misconduct that warrant imposition of a bargaining order: (1) Category I "exceptional" cases where the unfair labor practices committed are so "outrageous" and "pervasive" that traditional remedies cannot erase their coercive effects, thus rendering a fair election impossible; and (2) Category II cases, "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process." Id. at 614. In Category II cases, the "possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and . . . employee sentient once expressed through cards would, on balance, be better protected by a bargaining order[.]" Id. at 614–615.

The General Counsel does not distinguish between Category I and Category II but contends (GC Br. 56–57) that the Respondent's egregious unlawful conduct inarguably had a demonstrable adverse impact on the Union's employee support, citing *Dlubak Corp.*, 307 NLRB 1138, 1138 fn. 2 (1992) (*Gissel* bargaining order warranted where employees' withdrawal of support for the union was "the product of [the employer's] unfair labor practices"), enfd. 5 F.3d 1488 (3d Cir. 1993); and *Garvey Marine*, 328 NLRB 991, 995 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001) (employer's serious and repeated unfair labor practices undermined union's majority strength, warranting *Gissel* bargaining order).

In support of its position, the General Counsel argues that Union had majority support at the time the petition was filed on August 11, but only a few weeks later, that support dropped to 30 percent due to the Respondent's pervasive unlawful conduct, in particular its discharge of Rossey and its coercion of employees to sign a petition denouncing the Union.[9]

[9] There is no evidence that the Respondent coerced employees into signing the decertification petition. On this record, Lundberg alone initiated and circulated it without any management involvement.

General Counsel's Exhibit 2 shows that 14 employees signed authorization cards between March 27 and August 9, prior to the Respondent's unfair labor practices that occurred starting on August 12. This represented over half of the unit. General Counsel's Exhibit 4 shows that 13 employees later signed the decertification petition, between August 30 and September 21. These included employees who had signed authorization cards: Garner, Mathis, Matis, and Schwartz. Regardless of their testimony of why they changed in their support for the Union, *Gissel* "does not require that the unfair labor practices must actually cause the loss of majority status. As long as they have the tendency to do so, a bargaining order is appropriate." *Amber Delivery Service, Inc.*, 250 NLRB 63, 66 (1980), enfd. in part, vacated in part, 651 F.2d 57 (1st Cir. 1981).

In determining whether to issue a bargaining order, the Board examines "the seriousness of the violations and their pervasiveness, the size of the unit, the number of affected employees, the extent of dissemination, and the position of the persons committing the violations." *Bristol Industrial Corp.*, 366 NLRB No. 101, slip op. at 3 (2018).

The Union cites (U Br. 44) the well-established principle that the discharge of union supporters is a significant consideration in determining whether such an order is appropriate. Thus, "The Board and courts have long considered the discharge of union adherents to be among the 'hallmark' violations justifying the issuance of bargaining orders," because they are more likely to destroy election conditions for a longer period time than are other unfair labor practices (fn. omitted)." *Milum Textile Services Co.*, 357 NLRB 2047, 2055 (2011), citing *Abramson, LLC*, 345 NLRB 171, 176 (2005); see also *Bristol Industrial Corp.*, above, slip op. at 2. As the Board stated in *Dayton Auto Electric, Inc.*, 278 NLRB 551, 558–559 (1986), citing *Apple Tree Chevrolet*, 237 NLRB 876 (1978), the discharge of an employee because of union activity "is one of the most flagrant means by which an employer can hope to dissuade employees from selecting a bargaining representative because no event can have more crippling consequences to the exercise of Section 7 rights than loss of work."

For the following reasons, I find a bargaining order appropriate under *Bristol Industrial Corp.*, above, as a *Gissel* Category II. Most significantly, the discharge of Rossey occurred on August 12, just 1 day after the Union filed its petition, and Franzen's discharge followed on August 18, only 6 days afterward, in a unit of approximately 23 employees. See *General Fabrication Corp.* 328 NLRB 1115, 1115 (1999), enfd. 222 F.3d 218 (6th Cir. 2000) (in a small unit of approximately 31 employees, "The impact of this action was magnified by its proximity to the onset of the Union's organizational effort."); see also *Debbie Reynolds Hotel, Inc.*, 332 NLRB 466, 467 (2000).

Furthermore, on August 16 and 17, Allen, the only on-site supervisor of unit employees at ExxonMobil, committed a number of violations of Section 8(a)(1) at a group meeting or individually with Selby. Also, on about August 16, Allen unlawfully harassed Holland, the leading union adherent.

Thus, the Respondent's commission of a series of unfair labor practices, including the discharges, occurred within a week after the petition was filed. It is noteworthy that on August 20, the Union called an unfair labor practice strike to protest the discharges of Rossey and Franzen, reflecting widespread knowledge by unit employees of the discharges. In short, the

Respondent's unfair labor practices had "the tendency to undermine majority strength and impede the election process," and I will include a bargaining-order remedy.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union of Operating Engineers, Local 150, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act:

(a) Discharged Robert Rossey on August 12, 2021.
(b) Discharged Cody Franzen on August 18, 2021.

4. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act:

(a) Gave employees the impression that their union activities were under surveillance.
(b) Threatened employees with loss of pay if they voted to be represented by the Union.
(c) Threatened employees with termination if they went out on an economic strike.
(d) Harassed employees for engaging in union activities.
(e) Announced stricter enforcement of rules because of the union organizing drive.
(f) Stated that it would be futile to select the Union as the employees' bargaining representative.
(g) Told employees that the Company was working on a petition that would make a union election unnecessary.

THE ELECTION

Objections

The critical period in this case is the period of time from August 11, the date the petition was filed, through the mail ballot election that ended on November 22. The Respondent's above conduct occurred during this timeframe. Accordingly, the Union's objections 18 and 20–26 are sustained. The Union's remaining objections are overruled.

Challenged Ballots

Having found that Robert Rossey and Cody Franzen were wrongfully discharged, I order that their ballots be opened and counted.

I adhere to the Regional Director's determination that the following individuals are eligible unit employees and not supervisors, and I order that their ballots be opened and counted: Petr Jesiolowski, Quinn Johnson, Jeff Lundberg, Robert Weathersby, and Chris Woodward.

I further order that the ballots of Nikolas Holland and Cody O'Neal, which were timely submitted to the United States Postal Service but not delivered in time for the ballot count, be opened and counted.

Finally, I order that the ballot of Jordan Darnell, whose eligibility is no longer contested, be opened and counted.

REMEDY

Because I have found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Rossey and Franzen, it must offer them full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed; and make them whole for any losses of earnings and other benefits suffered as a result of their discharges. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In addition, the Respondent shall compensate Rossey and Franzen for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. *Advoserv of New Jersey, Inc.*, 363 NLRB 1324 (2016); *Don Chavas, LLC*, 361 NLRB 101 (2014). The Employer shall compensate Rossey and Franzen for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable next backpay, with interest at the rate prescribed in *New Horizons*, above, compounded daily as prescribed in *Kentucky River Medical Center*, above. In addition to the backpay-allocation report, the Employer shall file with the Regional Director copies of Rossey's and Franzen's corresponding W-2 forms reflecting the backpay awards. *Cascades Containerboard Packing—Niagara*, 370 NLRB No. 76 (2021).

The General Counsel requests that the Respondent be directed to send letters of apology to Rossey and Franzen, but I find such a remedy superfluous and therefore will not order it.

The General Counsel also seeks an order that Hill read the notice to employees on worktime in the presence of a Board agent at the Respondent's three Illinois locations or, alternatively have a Board Agent read the notice to employees during worktime in the presence of the Respondent's supervisors and agents identified in the Complaint. Public reading of the

notice to employees is a remedial measure that ensures that the employees "will fully perceive that the Respondent and its managers are bound by the requirements of the Act." *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), affd. 400 F.3d 920, 929–930 (D.C. Cir. 2005); see also *Johnston Fire Services, LLC*, 371 NLRB No. 56, slip op.at 7 (2022). I agree that the notice should be read as the General Counsel requests but will not specify which management official(s) should do so.

Upon the Union's request, the Respondent shall within 10 days of the request commence bargaining in good faith with the Union for a reasonable time and, if an understanding is reached, embody the understanding in a signed agreement. *Nickolas County Health Care Center*, 331 NLRB 970, 970 (2000); *Raven Government Services*, 331 NLRB 651, 651 (2000).

The challenged ballots that I described above shall be opened and counted within 10 days from the date of this decision. If the final revised tally in this proceeding reveals that the Union has received a majority of the valid ballots case, the Regional Director shall issue a certification of representative, in addition to the bargaining order. If, however, the revised tally shows that the Petitioner has not received a majority of the valid votes cast, the Regional Director shall set aside the election, dismiss the petition, vacate the proceedings in Case 13–RC–281169, and the bargaining order alone shall take effect. *Concrete Form Walls, Inc.*, 346 NLRB 831, 840 (2006); *General Fabrications Corp.*, 328 NLRB 1114, 1116 fn. 17 (1999); *Eddyleon Chocolate Co.*, 301 NLRB 887, 892 (1991).

The Respondent shall immediately reinstate the unfair labor practice strikers after they make an unconditional offer to return to work as per *NLRB v. International Van Lines*, 409 U.S. 48, 50–51 (1972); *Maestro Plastics v NLRB*, 350 U.S. 270, 278 (1956).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Spike Enterprise, Inc., Channahon, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because of their support for International Union of Operating Engineers, Local 150, AFL–CIO (the Union).

(b) Giving employees the impression that their union activities are under surveillance.

(c) Threatening employees with loss of pay if they vote to be represented by the Union.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Threatening employees with termination if they go out on an economic strike.

(e) Harassing employees for engaging in union activities.

(f) Announcing stricter enforcement of work rules because of the union organizing drive.

(g) Stating that it will be futile for employees to select the Union as their bargaining representative.

(h) Telling employees that the Company is working on a petition that would make a union election unnecessary.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of the Board's Order, offer Robert Rossey and Cody Franzen full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Rossey and Franzen whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges of Rossey and Franzen and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

(d) Immediately recognize the Union as the collective-bargaining representative of unit employees, retroactive to November 22, 2021, and within 10 days of a request for bargaining by the Union, commence bargaining for a reasonable time and, if an understanding is reached, embody the understanding in a signed agreement.

(e) Offer unfair practice strikers immediate reinstatement after they make an unconditional offer to return to work.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facilities in Channahon, Blue Island, and Lemont, Illinois, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. The notice shall be read in the presence of all unit employees by a responsible management official or by a Board agent in the presence of a management official. If during the pendency of these proceedings, the Respondent has gone out of business or closed any of its Illinois facilities, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 12, 2021.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

The complaint is dismissed insofar as it alleges violations of the Act that I have not specifically found.

Dated, Washington, D.C. May 16, 2022

Ira Sandron
Administrative Law Judge

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board (NLRB) has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you for supporting International Union of Operating Engineers, Local 150, AFL–CIO (the Union) or any other labor organization.

WE WILL NOT give you the impression that your union activities are under surveillance.

WE WILL NOT threaten you with loss of pay if you vote to be represented by the Union.

WE WILL NOT threaten you with termination if you go out on an economic strike.

WE WILL NOT harass you for engaging in union activities.

WE WILL NOT announce stricter enforcement of work rules because of the union organizing drive.

WE WILL NOT state that it will be futile for you to select the Union as your bargaining representative.

WE WILL NOT tell you that the Company is working on a petition that would make a union election unnecessary.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Robert Rossey and Cody Franzen full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Rossey and Franzen whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, in the manner set forth in the remedy section of the decision.

WE WILL remove from our files any reference to our unlawful discharges of Rossey and Franzen, and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL, on the Union's request, bargain with the Union as the exclusive collective-bargaining representative of our full-time and regular part-time operators, techs, and laborers employed at our three Illinois locations and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL offer unfair labor practice strikers immediate reinstatement after they make unconditional offers to return to work.

Spike Enterprise, Inc.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

1222 Spruce Street, Room 8.302, St. Louis, MO 63103-2829
(314) 539-7770, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/14-CA-281652 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE. THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (314) 449-7493.